RE THANGARAJOO VYRAN; EX P DENKO INDUSTRIAL CORPORATION BHD

HIGH COURT MALAYA, KUALA LUMPUR
MOHAMAD ARIFF YUSOF J
[BANKRUPTCY NO: D29-3242-2010]
6 JANUARY 2011

BANKRUPTCY: *Creditor's petition - Stay of petition, application for - Stay pending judgment debtor's appeal in Court of Appeal - Whether "sufficient reason" or "special circumstances" needed to be shown - Whether absence of stay of execution a relevant factor - Whether judgment creditor prejudiced*

CIVIL PROCEDURE: *Stay of proceedings - Bankruptcy proceedings - Stay pending judgment debtor's appeal in Court of Appeal - Whether "sufficient reason" or "special circumstances" needed to be shown - Whether absence of stay of execution a relevant factor - Whether judgment creditor prejudiced*

The judgment debtor ('JD') had filed an application *vide* encl. 11 to stay the hearing of the creditor's petition pending the hearing of the JD's appeal in the Court of Appeal on the judgment recorded which formed the foundation for the instant bankruptcy proceedings. The JD had been ordered by the High Court to pay a sum of RM3,000,000 to the judgment creditor ('JC'). However, there was no stay on the execution of the said High Court judgment pending the said appeal. The Senior Assistant Registrar dismissed encl. 11 and hence, this appeal.

Held (allowing encl. 11):

(1) Pursuant to s. 97 of the Bankruptcy Act 1967, the JD only needed to show a "sufficient reason" for the court to exercise its discretion to grant stay and not the higher threshold of "special circumstances" in an ordinary application for a stay of execution in a judgment pending appeal (*Re Rosli Abdul Kadir, Ex p Bank Kerjasama Rakyat Malaysia Bhd*; refd). On the facts, the grounds raised by the JD were not totally unmeritorious or lacked in *bona fides* that they should be rejected summarily without according him an opportunity to ventilate the case fully before the Court of Appeal. (para 3)

(2) There were serious points of law and fact that needed to be ventilated before the Court of Appeal. Although there might not be special circumstances to warrant stay of execution of

A the judgment, there would be a "sufficient reason" to allow an application for stay of the bankruptcy proceedings until the issues were fully ventilated before the Court of Appeal. Further, the fact that there was no stay of execution of the judgment pending appeal was a relevant factor, though not the
B only relevant factor. (paras 3, 5 & 6)

(3) Bankruptcy proceedings are provided to facilitate recovery of a sum due on a proper judgment and not a procedural avenue to be raised *in terrorem* against a JD who has not fully
C exhausted his rights of appeal. Besides, the fixing of the hearing date for the appeal was a matter of time when the application for stay came before this court and this would not result in any undue prejudice to the JC. (para 7)

Case(s) referred to:
D *Ex Parte Heyworth [1884] QBD Vol XIV 49* ***(refd)***
Re Rosli Abdul Kadir; Ex p Bank Kerjasama Rakyat Malaysia Bhd [2008] 5 CLJ 691 HC ***(refd)***

Legislation referred to:
E Bankruptcy Act 1967, s. 97

For the judgment debtor - Harikannan; M/s Jayadeep Hari & Jamil
For the judgment creditor - Emilianie Chin Woan Yun; M/s YH Teh & Quek

Reported by Kumitha Abd Majid

F

JUDGMENT

Mohamad Ariff Yusof J:

G **[1]** This was an appeal from the decision of the Senior Assistant Registrar who had dismissed the judgment debtor's application to have the hearing of the creditor's petition stayed pending the hearing of the judgment debtor's appeal in the Court of Appeal on the judgment recorded which formed the foundation for the
H instant bankruptcy proceedings.

[2] The judgment debtor had been ordered by the High Court to pay a sum of RM3,000,000 to the judgment creditor. The judgment was dated 5 April 2010.

I

[3] There was no stay on the execution of the said High Court judgment. I allowed the appeal nevertheless. In exercise of this court's discretion, this was a proper case for a stay to be granted. The grounds raised by the judgment debtor were not totally unmeritorious or lacking in *bona fides* that they should be rejected summarily without according him the opportunity to ventilate his case fully before the Court of Appeal. That there was no stay of execution of the judgment pending appeal was a relevant consideration, but it would have been an improper exercise of this court's judicial discretion to take this as the only relevant factor. It is established law that pursuant to s. 97 of the Bankruptcy Act 1967 the judgment debtor needed only to show a "sufficient reason" for the court to exercise its discretion to grant stay, not the higher threshold of "special circumstances" in an ordinary application for a stay of execution of a judgment pending appeal. This was an application for stay in bankruptcy proceedings where the governing principle must be as laid down in s. 97. See *Re Rosli Abdul Kadir; Ex P Bank Kerjasama Rakyat Malaysia Bhd* [2008] 5 CLJ 691:

> Section 97 of the Bankruptcy Act 1967 the provision under which the application is made provides as follows:
>
> The court may at any time, for sufficient reason, make an order staying the proceedings under a Bankruptcy Petition, either altogether or for a limited time, on such terms and subject to conditions as the court thinks just.
>
> The 'special circumstances' test is an acceptable test in an application for a stay of execution usually pending appeal. This has been affirmed by the Federal Court in several cases which need not be cited here as this is a well accepted guiding principle in deciding whether a stay of execution of a judgment should be granted or not pending appeal against a judgment. Nevertheless the 'special circumstances' test is a creation of the courts and is not provided by the statutes. 'Special circumstances' are also referred to as 'special grounds' by certain courts.
>
> The test of 'special circumstances' or 'special grounds' is distinct from the test of 'sufficient reason' in its principle, legal meaning, weight to the test, degree of burden to be proved to satisfy the court and particular facts that need to be adduced to pass each test. Even the words 'special' and 'sufficient' are different in their ordinary meanings.
>
> … Certainly, the weight and degree of burden to be proved to satisfy the court in 'special circumstances' test is higher than the 'sufficient reason' test and the weight and the degree of burden

A to be proved to satisfy the court in 'sufficient reason' test is lower than in the 'special circumstances' test. To quote the words of Abdul Hamid Mohamad JCA (as he then was) in *Ming Ann Holdings Sdn Bhd v. Danaharta Urus Sdn Bhd* [2002] 3 CLJ 380 CA:

B

> ... the special circumstances must be special, not ordinary, common or usual circumstances and that go to the execution of the judgment and not to the validity or correctness of the judgment (or merits of the appeal)

C

> ... In our local case of *Malayan Banking Bhd v. Datuk Lim Kheng Khim (2)* [1992] 3 CLJ 1616; [1992] 2 CLJ (Rep) 840, Abdul Hamid Mohamad JC (as he then was) exercised His Lordship's discretion to stay further bankruptcy proceeding until the appeal is heard, as some serious points of law have been raised in this proceedings which no doubt will be decided by the Supreme

D Court, on appeal. (at pp. 693 - 695)

[4] In the common law case of *Ex Parte Heyworth* [1884] QBD Vol XIV 49 the proposition was advanced in very categorical terms that where there was a reasonable ground for an appeal of

E the hearing of a bankruptcy petition ought to be adjourned. The following passage by Bowen LJ is particularly relevant:

> ... Assuming that the Appellant is right in saying that the sum is due to him in a final judgment, the judgment ... is under appeal, and the question is, whether the pendency of this appeal justified

F the registrar in ordering the petition to stand over for the present. This was an exercise of the registrar's discretion. *It cannot, of course, be said that the mere fact that an appeal is pending from the judgment, gives the Debtor an absolute right to a stay of proceedings, or to have the petition dismissed ... The Registrar is clothed with discretion;*

G *he has an absolute discretion to consider what is the best thing to be done under the circumstances. And it would be impossible for this Court to interfere with the exercise of his discretion unless we were satisfied that the Registrar could not have been right. If it could be shown that the appeal from the judgment must be frivolous one, we might reverse his decision. But, so long as he might reasonably have come to the conclusion*

H *that there was a reasonable ground of appeal, it would be a monstrous thing that a receiving order should be made while the appeal is pending.* (At pp. 51 to 52 of the report; emphasis added)

[5] Having considered the judgment creditor's grounds advanced for the appeal, there existed serious points of law and fact to be

I ventilated before the Court of Appeal.

[6] The judgment was obtained in a suit instituted by the judgment creditor against the judgment debtor and a company called Gigantic Innovations Sdn Bhd. The immediate parties were the judgment creditor and Gigantic Innovations and the contract was for the judgment creditor to purchase Gigantic Innovations' shares in another company called Teknik Datasaab Sdn Bhd, for which a profit guarantee of RM3 million was given by Gigantic Innovations. It was further provided if there was a shortfall, Gigantic Innovations would pay to Teknik Datasaab Sdn Bhd that shortfall. The judgment creditor in turn provided a guarantee that if Gigantic Innovations failed to top up the shortfall, the judgment creditor himself would pay the shortfall to Teknik Datasaab Sdn Bhd. It was the judgment debtor's contention that the judgment creditor, as merely a shareholder in Teknik Datasaab, was not a recipient of the shortfall covered by the guarantee provided by the judgment debtor, as opposed to Teknib Datasaab itself. These were reasonable grounds for the appeal before the Court of Appeal. Although there might not be special circumstances to warrant a stay of execution of the judgment, there would be "sufficient reason" to allow an application for stay of the bankruptcy proceedings until the issues are fully ventilated before the Court of Appeal.

[7] Bankruptcy proceedings are provided to facilitate recovery of a sum due on a proper judgment, but should not be a procedural avenue to be raised *in terrorem* against a judgment debtor who has not fully exhausted his rights of appeal. Seeing that bankruptcy proceedings have disastrous consequences to a person's life and livelihood, the court's judicial discretion should, I feel, be properly considered against the full circumstances of the case at hand and not be made merely dependent mechanistically on whether there has been a stay of execution on the judgment. The issue in this connection is thrown in sharper relief when the present speed in the disposal of appeals by the Court of Appeal is considered. The fixing of the hearing date for the appeal was a matter of time, when the application for stay came before this court. It would not have resulted in any undue prejudice to the judgment creditor if it be made to patiently wait for a short duration for the appeal to be heard and disposed.

[8] For the above stated reasons, I allowed the judgment debtor's application for stay in encl. 11, with no order as to costs.